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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF NEVADA
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12 UNITED STATES OF AMERICA,) 3:00-cr-00058-HDM-RAM
13 Plaintiff,) 3:00-cr-00109-HDM-RAM
14) ORDER
15 vs.)
16 HUMBERTO MAGANA ARIAS,)
17 Defendant.)
_____)

18 Before the court is *pro se* defendant Humberto Magana Arias'
19 letter (ECF No. 286), filed on June 10, 2016, requesting relief in
20 light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

21 **I. Background**

22 On August 16, 2000, an indictment was issued in Case No. CR-N-00-
23 109-HDM(RAM) charging the defendant with unlawful reentry by deported
24 alien. (ECF No. 1). On August 1, 2001, a third superseding
25 indictment was issued in Case No. CR-N-00-58-HDM(RAM) charging the
26 defendant with conspiracy to possess with intent to distribute and to
27 distribute methamphetamine, distribution of methamphetamine, unlawful
28 use of a communication facility, and aiding and abetting. (ECF No.

1 90). On March 7, 2002, with no objection by either party, the court
2 elected to treat Case Nos. CR-N-00-58-HDM(RAM) and CR-N-00-109-
3 HDM(RAM) separately. (ECF No. 121). While the two cases were
4 consolidated for the purpose of sentencing, the court issued a
5 separate sentence and judgment for each case.

6 After a plea of not guilty in Case No. CR-N-00-58-HDM(RAM), the
7 defendant was found guilty on all counts of the third superseding
8 indictment (ECF Nos. 97-101). On March 14, 2002, a judgment of
9 conviction was entered and defendant was sentenced to a total term of
10 two hundred and forty months imprisonment and ten years of supervised
11 release. (ECF No. 124).

12 The defendant pleaded guilty to all counts in the indictment in
13 Case No. CR-N-00-109-HDM(RAM). On March 15, 2002, a judgment of
14 conviction was entered and defendant was sentenced to a total term of
15 twenty-one months imprisonment and three years of supervised release.
16 (ECF No. 49). This sentence was to run concurrently with the term
17 imposed in Case No. CR-N-00-58-HDM(RAM).

18 **II. June 10, 2016 Letter**

19 On June 10, 2016, the defendant filed a letter in Case No. CR-N-
20 00-58-HDM(RAM). Defendant states that his sentence was enhanced by
21 his prior felony drug and crime of violence convictions, and cites the
22 information regarding his prior convictions that the government filed
23 on May 9, 2000. (ECF No. 19). While the government filed the
24 information in Case No. CR-N-00-58-HDM(RAM), the defendant's prior
25 convictions were used to enhance his sentence in Case No. CR-N-00-109-
26 HDM(RAM). (See ECF No. 112 (Defendant's sentencing memorandum)). As
27 such, the defendant argued in his sentencing memorandum that "his
28 convictions for Possession of the Control Substance with a Firearm,

1 under the Influence of the Control Substance, and Discharging a
2 Firearm in Public are convictions covered by section (C) of the new
3 amendments to the U.S.S.G. Section 2L1.2 [Unlawful Entering or
4 Remaining in the United States]." (ECF No. 112 at 2-3). On March 6,
5 2002, the court sustained the defendant's objection in Case No. CR-N-
6 00-109-HDM(RAM) to the sixteen-level increase, and ordered that
7 Paragraph 21 of the Presentence Investigation Report should reflect
8 an eight-level increase under U.S.S.G. Section 2L1.2(a)(C) in lieu of
9 sixteen levels. (ECF No. 120). As it appears that the defendant
10 filed this letter in the wrong case, the Clerk of Court shall file the
11 defendant's letter (ECF No. 286) in Case No. CR-N-00-109-HDM(RAM).

12 To the extent that defendant seeks to challenge his sentence in
13 Case No. CR-N-00-109-HDM(RAM) based on a claim that he is entitled to
14 federal habeas relief in light of *Johnson v. United States*, 135 S. Ct.
15 2551 (2015), such a motion to vacate, set aside or correct the
16 sentence is governed by 28 U.S.C. § 2255. However, a court may not
17 recharacterize a *pro se* litigant's motion as the litigant's first
18 § 2255 motion unless the court informs the litigant of its intent to
19 do so. *Castro v. United States*, 540 U.S. 375, 382 (2003). As the
20 Ninth Circuit explained in *United States v. Seesing*:

21 When presented with a *pro se* motion that could be
22 recharacterized as a 28 U.S.C. § 2255 motion, a district
23 court should not so recharacterize the motion unless: (a)
24 the *pro se* prisoner, with knowledge of the potential
25 consequences of such a recharacterization, consents or
26 (b) the district court finds that because of the relief
27 sought that the motion should be recharacterized as a
28 U.S.C. § 2255 motion and offers the *pro se* prisoner the
opportunity, after informing the prisoner of the
consequences of recharacterization, to withdraw the
motion. Under either scenario, the *pro se* prisoner has
the option to withdraw the motion and file one all-
inclusive U.S.C. § 2255 motion within the one-year
statutory period.

1 234 F.3d 456, 464 (9th Cir. 2000).

2 Here, defendant's letter, liberally construed, could be
3 characterized as a motion to vacate, set aside or correct the sentence
4 under 28 U.S.C. § 2255. As required under *Castro* and *Seesing*, the
5 court will provide the defendant an opportunity to clarify whether he
6 seeks relief pursuant to § 2255 and provide him notice of the
7 potential adverse consequences of treating the request as a § 2255
8 motion. Specifically, if the court were to treat the request as a
9 § 2255 motion, the defendant will be subject to the restrictions on
10 "second or successive" motions. *Castro*, 540 U.S. at 383. Where the
11 defendant has previously filed a § 2255 petition, a second or
12 successive § 2255 petition cannot be considered by the district court
13 absent a certificate from the Court of Appeals authorizing it to do
14 so. 28 U.S.C. § 2255(h); 28 U.S.C. § 2244; *United States v.*
15 *Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011).

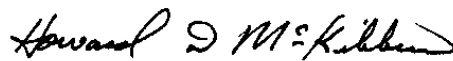
16 **III. Conclusion**

17 The Clerk of Court shall file the defendant's letter (ECF No.
18 286) in Case No. CR-N-00-109-HDM(RAM).

19 No later than September 15, 2016, the defendant must either (1)
20 consent to having his letter construed as a § 2255 motion, or (2) file
21 a § 2255 motion, if he chooses not to consent to recharacterizing his
22 request as a § 2255 motion.

23 IT IS SO ORDERED.

24 DATED: This 26th day of July, 2016.

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27 UNITED STATES DISTRICT JUDGE
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